

APPEAL NO. 040323
FILED APRIL 8, 2004

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on January 15, 2004. The hearing officer determined that the respondent's (claimant) impairment rating (IR) is 20%. The appellant (carrier) appeals this determination. The appeal file contains no response from the claimant.

DECISION

Affirmed.

The evidence reflects that, as a result of the compensable injury, the claimant underwent a two-level lumbar fusion on April 10, 2002. Texas Workers Compensation Commission (Commission) Advisory 2003-10, effective July 22, 2003, provides in part:

Clarification of Rating for Spinal Fusion(s).

For spinal fusion, the impairment rating is determined by the preoperative x-ray tests for "motion segment integrity" (page 102, 4th Edition of the *Guides to the Evaluation of Permanent Impairment*). If preoperative x-rays were not performed, the rating may be determined using the following criteria:

* * * *

- b. Multilevel fusion meets the criteria for [Diagnosis-Related Estimate (DRE)] Category IV, Structural Inclusions, as **this multilevel fusion is equivalent to "multilevel spine segment structural compromise"** per DRE IV. [Emphasis in original.]

The hearing officer did not err in relying on Advisory 2003-10 in determining that the claimant's IR is 20%, despite the fact that the Commission-selected designated doctor, Dr. C, did not rely on the advisory when he assigned the 20% IR. Texas Workers' Compensation Commission Appeal No. 032402-s, decided November 3, 2003. Nor was it error for the hearing officer to adopt an IR which rates a condition, loss of motion segment integrity, which presumably did not exist at the time of maximum medical improvement because it had been corrected by the fusion, as the advisory makes clear the rating is warranted in cases where surgery has been performed for the condition in question. Appeal No. 032402-s, *supra*. The carrier asserts that it was error to apply the advisory because the claimant's "pre-surgical x-rays of the lumbar spine" did not reveal loss of motion segment integrity. While the advisory states that it is applicable where pre-operative x-rays were not performed, the *Guides to the Evaluation of Permanent Impairment*, fourth edition (1st, 2nd, 3rd, or 4th printing, including

corrections and changes as issued by the American Medical Association prior to May 16, 2000) specifies that the x-rays referred to are flexion and extension roentgenograms (p. 98 and Table 71, No. 5, p.109). See also Texas Workers' Compensation Appeal No. 022509-s, decided November 21, 2002. There is no evidence that the specified roentgenograms were performed and, in fact, the carrier's peer review doctor, Dr. B, points out in his report that "no motion films were noted." We perceive no error in the hearing officer's reliance on Advisory 2003-10 to determine that the claimant's IR is 20%. Accordingly, the hearing officer found that Dr. C's initial report was entitled to presumptive weight and his amended report was not entitled to presumptive weight. Nothing in our review of the record indicates that the aforementioned findings of fact require reversal. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

The carrier essentially contends that in issuing Advisory 2003-10, the Commission engaged in ad hoc rulemaking, and as such, the hearing officer's reliance on the advisory is tantamount to applying the "wrong legal standard." Whether the Commission exceeded its authority in issuing Advisory 2003-10 is a matter for the courts. See Texas Workers' Compensation Commission Appeal No. 031441, decided July 23, 2003.

The decision and order of the hearing officer are affirmed.

The true corporate name of the insurance carrier is **ZURICH AMERICAN INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**LEE F. MALO
12222 MERIT DRIVE, SUITE 700
DALLAS, TEXAS 75251.**

Chris Cowan
Appeals Judge

CONCUR:

Margaret L. Turner
Appeals Judge

Edward Vilano
Appeals Judge